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CASE & COMMENT

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS REPORTS ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 13. OCTOBER, 1906. No. 5.

CASE AND COMMENT

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THE LAWYERS' CO-OPERATIVE PUB. CO.,
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A Dynamic Dictum.

It is not often that a *dictum* in a judicial opinion is made the slogan of battle, or of riot. Something approaching this has recently happened, however, in the more or less civilized region of Greater New York. The Brooklyn Rapid Transit Company claimed two fares of 5 cents each for a trip to Coney island, while the judicially minded patrons of the company thought one 5-cent fare all that the law required them to pay, and that the company was compelled to give them transfers for the second part of the trip. The transit company relied on a certain decision of the appellate division in support of the double charge, while the passengers relied on a *dictum* of Justice Gaynor in a habeas corpus case, in which he released a passenger who had been arrested for breach of the peace on account of his refusal to pay the second fare when demanded. Without entering into the merits of the legal question involved, it may be said that the situation became one of public lawlessness. The transit company opposed forces amounting to a small army against a multitude of the public. Some of the municipal officials took part in inflaming the people against what was deemed outrageous conduct of the carrier. For several days there was a kind of private war carried on between the representatives of this corporation and the general public. It is to the shame of the civilization of our greatest city that a simple question of law of this kind was allowed to become the cause of public turmoil and lawlessness. The spirit of riot breaks loose so easily that any encouragement of it by a municipal officer cannot be strongly enough condemned. There is something ludicrous about a miniature war of this kind over a 5-cent fare; but there is something very serious, nevertheless, in such an outbreak of lawlessness over what is simply and solely a question for judicial decision, and that, too, in a matter of very small value to any one of the individuals interested.

Was It a Dictum?

An editorial on this Coney island struggle, published in the Outlook, of New York, declares it "nonsense" to say that Justice Gaynor's statement in the habeas corpus case, that the transit company was entitled to but one fare, is a *dictum*. The Outlook contains so much that is excellent, and also expresses its views on all questions with such assurance, that many of its readers may suppose it to be an authority on legal matters as well as on everything else, unless

they are shown its mistakes. Although Justice Gaynor himself explained at length in the newspapers that this statement was a *dictum*, the Outlook has only contempt for that suggestion. But, inasmuch as the question actually decided by the judge was that the passenger whom he released on habeas corpus "could not be guilty of a breach of the peace in simply disputing the right of the conductor to make him pay a second fare," the question as to the amount of the fare demanded is entirely immaterial; his refusal to pay it, whatever it was, was not a breach of the peace. Still more clinching is the fact that in the habeas corpus case the rapid transit company, against which the Outlook holds this *dictum* to be conclusive, was not a party. It does not take great legal learning to know that what the court says in a case cannot constitute an adjudication as against one who is not a party to the proceeding. Yet the fact that the amount of the fare demanded was immaterial in deciding that a refusal to pay it was not a breach of the peace, and the fact that the transit company was not party to the proceeding, do not shake the Outlook's conviction that the judge's remarks about the amount of the fare made an adjudication of that matter as against the transit company. It therefore denounces that company as "guilty of anarchy" because it continued to demand the fare which it claimed to be entitled to. Such violent denunciation of a party to a legal controversy, for declining to abandon its claim of a legal right, without waiting for an adjudication of it, does not tend much to abate a state of lawlessness in resistance of the claim.

A New Way to Decide Law Questions.

The method proposed by the Outlook for the settlement of the trouble over the Coney island transfers is so unique and remarkable that it may justify even one more reference to the views of that journal. Its *ex cathedra* deliverance is as follows: "The head of the police in Brooklyn should have decided whether the Brooklyn Heights Railroad, or the passenger who refused to pay his fare, was acting legally. And the police should have had orders to arrest either every passenger who refused to pay, or else every conductor who attempted to eject the non-paying passenger." The simple question whether the law entitles a carrier to charge one fare or another is to be settled, according to the Outlook's plan, by the police department. Certainly none can hereafter doubt the Outlook's infallibility in legal matters.

Bank Directors' Negligence.

Every notorious bank failure in which the dishonesty of a cashier or other officer has ruined the bank brings forth much vigorous denunciation of the directors of the bank for their failure to prevent the wreck. That directors owe to the bank the duty to exercise care for its protection is, of course, admitted by all; but the extent of their duty is one of the very difficult questions with which the courts have to deal. Aroused by wrong to depositors or stockholders, many vigorous writers rush forward to demand the punishment of the directors, and often proceed on the assumption that, if the directors had done their duty, the loot of the bank must have been prevented. The courts called upon to deal with the subject in all its aspects, with the responsibility for doing justice to the directors as well as to all others, have spoken far more wisely and justly than most of those who have written on the subject in newspapers and periodicals, unburdened by any personal sense of responsibility in the matter. The courts have recognized that due care on the part of the directors did not mean the same thing as a guaranty of the honesty of the cashier or other officers whom they intrusted with the affairs of the bank.

A recent decision by the supreme court of Ohio in the case of Mason v. Moore, 73 Ohio St. 275, 4 L.R.A.(N.S.)—, 76 N. E. 932, states the doctrine of the subject very clearly. It declares that, while the directors are charged with the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men acting under like circumstances, yet they are not insurers of the fidelity of the cashier and other agents whom they have appointed, and not responsible for losses resulting from their

wrongful acts or omissions, if the directors themselves act in good faith and with ordinary care. The court also holds that the directors are not bound, as a matter of law, to know all the affairs of the bank, or what its books or papers would show; and that such knowledge cannot be imputed to them for the purpose of charging them with liability. The other cases on the subject generally sustain this doctrine, that the directors must exercise reasonable care and prudence; but the difficulty is to determine just what will constitute that. Since directors are not expected to give their whole time and attention to the business of the bank, they are entitled to commit the actual management of the business to their duly authorized officers. But they cannot be mere figureheads, and must still maintain a general supervision over the business, and have a general knowledge of the manner in which it is conducted. If directors were held to be insurers of the honesty of the cashier or other officers, no responsible the cashier or other officers, no responsible On the other hand, if the public should suppose that the directors of a bank exercised no function of care and watchfulness over its business, few people would do business with that bank. It seems impossible to lay down definite rules to determine what constitutes due care on their part. The courts lay much stress on any facts showing some ground of suspicion which the directors knew, or reasonably should have known. Any speculations of bank officers which cause comment and suspicion among business men generally are obviously sufficient to put the directors on inquiry, and require very sharp scrutiny of its management; but there are, unfortunately, too many conspicuous instances of the wrecking of banks by men whose reputation has been of the highest both in personal and business relations. It may be impossible, doubtless it is, to institute any system of checks and safeguards which will make it impossible for the ingenuity of a dishonest man to wreck a bank when he holds an important position of trust in it. There is a demand for legislation on the subject. But legislators may do serious harm by unwise enactments, and no legislation on such a subject can be safely attempted without the fullest participation and counsel of the ablest men in the banking business. It is not a case in which bankers have an interest adverse to that of the public. The interests of all honest bankers are identical with that of the public in this matter, and the public has a right to look to them to advocate the best measures possible on the subject.

Compelling Employees to Keep Out of Labor Unions.

The constitutionality of that provision of the New York Penal Code, § 171a, making it a misdemeanor for an employer to coerce or compel employees to enter into an agreement not to join a labor organization as a condition to securing or retaining employment, has recently been denied in the case of People v. Marcus, 77 N. E. 1073. One judge dissented. This decision establishes the freedom of contract between employer and employees with respect to such stipulations, even as against legislative interference. The court says: "The courts of this state recognize the right of employees and employers to organize and co-operate for any lawful purpose. Contracts for labor may be freely made with individuals or a combination of individuals, and, so long as they do not interfere with public safety, health, or morals, they are not illegal." The right of a person to refuse to work for another on any ground that he may regard as sufficient was upheld in National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369. The court there held that the employer had no right to demand a reason for the refusal to work. The right to stop work, or to refuse to enter upon an employment, could be based on the fact that some other employee was not a member of a certain organization. In the Marcus Case the court applied the converse of this rule, and held that an employer might refuse to employ a person who was a member of a labor organization, or make an employment conditional upon the employee's keeping out of such organization.

In Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.)292, 76 N. E. 5, the court held that an employer could make a valid agreement to employ only union laborers, and that such contract was not void as against public policy. It is obvious that, in the absence of statute, it must be true, therefore,

that a contract to employ nonunion laborers only is valid; and it would seem to be equally true that a contract of employment which bound the employee to remain out of the union must be valid. The only question really open in the Marcus Case, therefore, was whether this freedom of contract which the court had fully established by its former decision could be restricted by legislation. On this point the opinion of the court has little to say. It treats the decision in favor of the employer's freedom to contract as substantially settled by previous decisions to the effect that such contracts are not against public policy. The constitutional provisions against depriving a person of rights or privileges, except "by the law of the land," or of "life, liberty, or property without due process of law," are cited as the basis of the decision; and the court declares, briefly, that the restraints on personal liberty are limited to those which affect "the safety, health, and moral or general welfare of the public." The court does not, however, discuss at any length the question whether the restraint in question does affect the "moral and general welfare of the public." It merely decides, in effect, that it does not. The dissenting judge, on the other hand, regards this legislation as a step in the right direction, "dictated by every consideration of public policy." He contends that the statute should provide not only against compelling employees to keep out of the labor organization, but also against compelling them to join such organization. He says: "I trust the day is not far distant when to every working man will be open all the avenues of employment, whether he belongs to labor unions or other organizations, or stands alone upon his individual right to work for such a wage as seems to him just."

The power of the legislature to determine questions of public policy, or of the general welfare, is often, if not universally, admitted by the courts. In a great many cases statutory restraints upon the right of contract are upheld by the courts if made on grounds of public policy. Perhaps the oldest instance is that of usury laws. Restraints upon contracts by common carriers also are among the most familiar. Just at present the prohibition of rebates by common carriers or insurance companies is especially prominent, and, although in this class of cases one party to the contract is usually a corporation, it is not necessarily so. Statutes against contracts which, though innocent in themselves, might injuriously affect the course of justice, are also typical of a great variety of statutes in restraint of the freedom of contract. In many such cases the statute may declare only what the courts had previously decided on common-law grounds; but in numerous instances the statutes go beyond what the courts have ever held, and what was previously legal they declare illegal. In short, this power of the legislature to declare what shall be the public policy of the state is sustained in a great number of decisions. In other cases the courts, without denying it in general terms, deny that a particular enactment in dispute is a legitimate exercise of that power. But the line which separates the proper exercise of that power from an unconstitutional attempt to exercise it is one which it is impossible to draw so as to avoid an irreconcilable conflict in the decisions. In the Marcus Case the court seems to have assumed that the rule of public policy as laid down by the courts without regard to any statute on the subject cannot be changed by the legislature, though the court apparently concedes that the legislature may restrain contracts which affect the general "welfare of the public." It impliedly decides that the legislature has no power to determine what the general welfare of the public requires on this subject; but that this question is for the court to determine by its own views of public policy notwithstanding the adoption of the opposite view by the legislature. Without denying that the decision of the court on the constitutionality of the statute in question may be right, it is to be regretted that this ultimate question whether the legislature or the court should decide what the public policy or general welfare requires was left unnoticed.

Index to New Notes

IN

LAWYERS' REPORTS ANNOTATED

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Homicide.

Homicide as affecting devolution of property:—(I.) The public policy doc-

Among the New Decisions.

Attachment; receiver. An attachment is held, in Beardslee v. Ingraham (N. Y.) 3 L.R.A.(N.S.) 1073, to secure such possession of the real estate upon which it is levied that a receiver subsequently appointed by another court has no jurisdiction to interfere with it.

Bankruptcy. A judgment for assault and

battery, false imprisonment, and malicious prosecution is held, in McChristal v. Clisbee (Mass.) 3 L.R.A.(N.S.) 702, not to be affected by a discharge in bankruptcy, although defendant was not actuated by a wicked or malevolent desire to injure the plaintiff.

Bills and notes. A waiver by an accommodation indorser of a demand and notice of protest, with full knowledge that demand had not been made or notice of protest given, is held binding, in Burgettstown Nat. Bank v. Nill (Pa.) 3 L.R.A.(N.S.) 1079, although not based on a new consideration.

Boards. The power of a board of freeholders, appointed to draft a charter for a municipality, to employ and agree to pay one or more of its members as counsel for the board, is denied in Young v. Mankato (Minn.) 3 L.R.A.(N.S.) 849.

Carriers. An unauthorized inspection of property shipped in sealed cars, permitted by a carrier, is held, in Dudley v. Chicago, M. & St. P. R. Co. (W. Va.) 3 L.R.A.(N.S.) 1135, not to amount to a wrongful delivery, so as to make the carrier liable for the value of the property as for a conversion thereof.

A shipper is held, in Wabash R. Co. v. Campbell (Ill.) 3 L.R.A.(N.S.) 1092, not bound, in order to minimize damages and relieve himself from the charge of contributory negligence, to remove from the car in which his cattle are placed a notice erroneously posted thereon by the carrier, indicating that the cattle are from an infected district; such notices being provided by government regulation, and interference with them being prohibited under penalty.

Notice to a carrier that failure to deliver promptly cattle food will result in injury to the cattle is held, in Bourland v. Choctaw, O. & G. R. Co. (Tex.) 3 L.R.A.(N.S.) 1111, to be sufficient to entitle the shipper to recover damages for such injury, if given when the food has reached its destination; and the notice need not necessarily be given when the contract for transportation is made.

Confiscation. The power of the legislature to authorize the confiscation and sale of nets used in fishery contrary to the provisions of a statute, without according the owner notice or a hearing, is upheld in Daniels v. Homer (N. C.) 3 L.R.A.(N.S.) 997.

Contracts. See SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

Copyright. Where the proprietors of certain private schools permitted the agent of a firm of photographers to take photographs of the schools entirely at the risk of the photographers, and the agent took photographs of the grounds and exteriors of the schools and the interior of schools and groups of the pupils, as the proprietor suggested or permitted, and proofs were afterwards submitted, and some copies purchased by the proprietors, who sent copies of some of them to the publishers of an advertising medium, who reproduced them and inserted them in their publication, and the proprietors then registered the copyrights of the photographs in their own names as authors, it was held, in Stackemann v. Paton [1906] 1 Ch. 774, that permitting the photographer to enter the school and take the photographs on the chance of selling copies to the proprietors was a good consideration, and the photographs must be deemed to have been made for the proprietors for a good or valuable consideration within the meaning of the copyright act; and that the copyright therefore belonged to the proprietors of the schools, and not to the author of the photographs.

Corporations. A retrospective act changing the remedy to enforce stockholder's liability is held, in Harrison v. Remington Paper Co. (C. C. App. 8th C.) 3 L.R.A.(N.S.) 954, to be unconstitutional.

The reduction of preferred stock distributed ratably among its holders is held, in Roberts v. Roberts-Wicks Co. (N. Y.) 3 L.R.A.(N.S.) 1034, not to affect the right of a holder to receive from profits subsequently earned the deferred dividends upon the amount of his original holding up to the time of the reduction, where his contract provided that the dividends should be cumulative, deferred dividends to bear interest from the time of their maturity.

Covenants; condition subsquent. A personal covenant, and not a condition subsequent, is held, in Hawley v. Kafitz (Cal.) 3 L.R.A.(N.S.) 741, to be created by a provision in a deed that the same is given and accepted upon the express condition that a house shall be built on the premises within six months, and that such agreement is part of the consideration for the conveyance.

Criminal law. The power to compel an accused person who offers himself as a witness on his own behalf to write in the witness box, at the direction of the judge, a

specimen of his handwriting for comparison with a document in evidence, is denied in King v. Grinder (Sup. Ct. B. C.) 10 Can. Crim. Cas. 333.

Damages. The measure of damages for the occasional flooding of land because of an insufficient culvert is held, in Harvey v. Mason City & F. D. R. Co. (Iowa) 3 L.R.A. (N.S.) 973, to be the difference between the fair market value of the land immediately before and after the injury, including therein the value and condition of the crops which may have been injured.

Loss of use of a portion of a manufacturing plant is held, in Connersville Wagon Co. v. McFarlan Carriage Co. (Ind.) 3 L.R.A. (N.S.) 709, not to be a proper element of damages for failure to deliver certain goods to a manufacturer.

The value of land on a river bank, sought under the power of eminent domain for a pond to supply a water power, as part of the natural power at that point, is held, in Brown v. W. T. Weaver Power Co. (N. C.) 3 L.R.A.(N.S.) 912, to be properly considered in fixing the compensation.

Deeds. A grantor is held, in Adkins v. Huff (W. Va.) 3 L.R.A.(N.S.) 649, not to have absolute and unconditional title to timber, under a clause in the conveyance to the effect that he "reserves and still owns all timber, etc."

Descent and distribution. The right of the court to ingraft an exception upon a plain provision of the statute of descent because the distributee has murdered his ancestor to secure possession of the property is denied in McAlister v. Fair (Kan.) 3 L.R.A.(N.S.) 726.

Divorce. See HUSBAND AND WIFE.

Dower. See HUSBAND AND WIFE.

Easement; servitude. A deed partitioning land between heirs is held, in Gaynor v. Bauer (Ala.) 3 L.R.A.(N.S.) 1082, not to convey easements to continue existing stairways and drains on the division line.

The owner of land across which an easement has been acquired for a right of way for a ditch is held, in Smith Canal or D. Co. v. Colorado Ice & S. Co. (Colo.) 3 L.R.A. (N.S.) 1148, to have a right to cross the same with a pipe line to utilize, on one side of the ditch, water developed on the other side.

Electric wires. A telephone company maintaining wires upon another's premises is held, in Guinn v. Delaware & A. Teleg. & Teleph. Co. (N. J. Err. & App.) 3 L.R.A. (N.S.) 988, to be under a duty to a third person upon the premises to exercise care with respect to the condition of its wires, even though the latter is a trespasser as between himself and the owner of the premises.

Eminent Domain. See DAMAGES.

Estoppel. The true owner of land is held, in Equitable L. & S. Co. v. Lewman (Ga.) 3 L.R.A.(N.S.) 879, to be estopped to assert title by attesting a deed made by a person who has no title; but such estoppel will not bind an existing creditor.

Evidence. A despatcher's record of the arrival and departure of trains is held, in Louisville & N. R. Co. v. Daniel (Ky.) 3 L.R.A.(N.S.) 1190, to be admissible to show the location of a train at the time of an alleged accident.

Executors and administrators. An administrator is held, in Koslowski v. Newman (Neb.) 3 L.R.A.(N.S.) 704, not to be entitled to possession of property of the intestate as against a defendant who shows that he is the equitable owner, in the absence of proof that there are creditors whose equitable claims take precedence over defendant's.

Homicide. Whether a killing with a deadly weapon was intentional, or the result of an accident, is held, in State v. Legg (W. Va.) 3 L.R.A.(N.S.) 1152, to be a question for the jury, where the evidence tends in an appreciable degree to establish both theories.

An indictment for murder is held, in Commonwealth v. Snell (Mass.) 3 L.R.A. (N.S.) 1019, not to be bad for failure to allege the time and place of the commission of the crime, where the caption gives the name of the county and court and the time of the finding of the indictment.

Husband and wife. The right of a wife to make a valid gift *causa mortis* of all her property, thereby depriving her husband of any distributive share therein, is upheld in Wright v. Holmes (Me.) 3 L.R.A.(N.S.) 769.

The right of a wife to defeat a conveyance by her husband of all his personal property when ill, shortly before death, as a fraud on her marital rights, is denied in Robertson v. Robertson (Ala.) 3 L.R.A. (N.S.) 774.

The remarriage of the parties is held, in Savage v. Savage (C. C. App. 4th C.) 3

L.R.A.(N.S.) 923, not to invalidate a contract by which a divorced man agrees to allow his former wife an annuity in lieu of alimony allowed to her by a decree of divorce.

A wife's inchoate right of dower during her husband's life is held, in Mackenna v. Fidelity Trust Co. (N. Y.) 3 L.R.A.(N.S.) 1068, to entitle her to redeem from a sale under foreclosure of a mortgage, to which she was not a party, subject to which her husband acquired title to real estate.

A wife is held, in Hyatt v. O'Connell (Iowa) 3 L.R.A.(N.S.) 971, not to be estopped to assert her dower rights by permitting her husband to use the proceeds of his land in her support.

A husband's persistent harsh conduct toward his wife, who was a woman of delicate constitution, which created mental distress sufficient to impair her health, together with threats and menaces sufficient to create a well-founded apprehension that she would suffer worse and more injurious treatment if she did not submit implicitly to anything he might do or say, was held in Lovell v. Lovell, 11 Ont. L. Rep. 547, to amount to matrimonial cruelty, although no bodily violence was inflicted.

Ice. The right of the legislature to forbid the taking of ice from a stream the title to which is in the public, in favor of a public use for skating and other sports, is upheld in Des Moines v. Diamond Ice Co. (Iowa) 3 L.R.A.(N.S.) 1103.

Injunction. The author of a medical text-book is held, in Cleveland v. Martin (Ill.) 3 L.R.A.(N.S.) 629, not to be entitled to enjoin the publisher from distributing copies alleged to be inferior to those called for by the contract, on the theory that his professional reputation will be injured thereby, unless he establishes that such injury will result.

The right of equity to interfere to reinstate a pastor of a religious denomination who has been expelled without any violation of the trust under which the property is held, is denied in Duessel v. Proch (Conn.) 3 L.R.A.(N.S.) 854.

The power of courts to enjoin the commission of a crime where property rights are involved is upheld in Ex parte Allison (Tex. Crim. App.) 3 L.R.A.(N.S.) 622.

Insurance. The property of a mutual insurance company for all except corporate purposes is held, in Huber v. Martin (Wis.) 3 L.R.A.(N.S.) 653, to belong to its members, whether stockholders in a technical sense or in a broader one, including policy holders.

The "legal heirs" of a member of a benefit society, to whom the benefit is payable, are held, in Thomas v. Supreme Lodge, K. of H. (Wis.) 3 L.R.A.(N.S.) 904, to be the persons designated as distributees by the statutes for the distribution of personal property of intestates.

The removal of a tenant, of which the owner has no notice or reasonable opportunity to obtain notice, is held, in Ohio Farmers' Ins. Co. v. Vogel (Ind.) 3 L.R.A.(N.S.) 966, not to constitute a breach of a condition against vacancy.

An assignment of one half of life insurance to one having no insurable interest, in consideration of his payment of premiums as they accrue, is held, in Metropolitan L. Ins. Co. v. Elison (Kan.) 3 L.R.A.(N.S.) 934, to be in contravention of public policy.

Intoxicating liquors. That an illegal sale of intoxicating liquors is made in a local-option territory is held, in Commonwealth v. Barbour (Ky.) 3 L.R.A.(N.S.) 620, not to require the proceedings against the vendor to be taken under the local-option law, if the act also constitutes an offense against the general liquor law.

Liability for selling liquor to a minor is held, in Tony v. State (Ala.) 3 L.R.A.(N.S.) 1196, not to be affected by the fact that it was bought for, and delivered by the minor to, an adult, if such fact was not disclosed to the seller.

Judgment. A decree fixing the amounts and priorities of liens, and directing a sale of the debtor's land on default, is held, in Barbour, Stedman, & Herod v. Tompkins (W. Va.) 3 L.R.A.(N.S.) 715, after the expiration of the term at which it was rendered, to be final and conclusive as to the amounts of the debts, so that an answer praying the elimination of usury from one of the debts cannot be received thereafter.

Landlord and tenant. The doctrine of assumed risk is held, in B. Shoninger Co. v. Mann (Ill.) 3 L.R.A.(N.S.) 1097, not applicable to relieve a landlord from liability to a tenant's employee for injuries caused by the unsafe condition of a common passageway.

The right of the lessor to recover damages for injury to the enjoyment and occupation of premises while they are in pos-

session of a tenant, by the maintenance of a nuisance not of a permanent character on adjoining premises, is denied in Miller v. Edison Electric Illum. Co. (N. Y.) 3 L.R.A. (N.S.) 1060, although during such continuance the lease had terminated and been renewed at a reduced rental because of the nuisance.

Levy and seizure. A statutory exemption of work horses is held, in Tishomingo Sav. Inst. v. Young (Miss.) 3 L.R.A.(N.S.) 693, not to include high-bred horses, used by a man in driving to and from his business and in taking his family riding.

Libel. A writing stating that a person had been bribed to testify as a witness is held, in Atlanta News Pub. Co. v. Medlock (Ga.) 3 L.R.A.(N.S.) 1139, to be libelous.

The burden of showing absence of good faith and probable cause where the occasion is shown to be privileged is held, in Denver Pub. Warehouse Co. v. Holloway (Colo.) 3 L.R.A.(N.S.) 696, to be upon the party seeking damages for an alleged libel.

Limitation of actions. An injunction against the commencement of an action is held, in Hunter v. Niagara F. Ins. Co. (Ohio) 3 L.R.A.(N.S.) 1187, not to save the running of the statute of limitations, unless the statute so provides.

The rule that the statute of limitations does not run against a state is held, in Eastern State Hospital v. Winston (Va.) 3 L.R.A.(N.S.) 746, applicable in favor of a claim by a hospital, which is a mere agency of the state, owned and controlled by it.

Malicious prosecution; false imprisonment. The discharge of accused, not brought about by procurement of complaining witness nor attended by circumstances involving his conduct, is held, in Davis v. McMillan (Mich.) 3 L.R.A.(N.S.) 928, not to be evidence of want of probable cause, in an action against such witness for malicious prosecution.

Mandamus. The right to mandamus to compel a medical college to comply with its contract to furnish a diploma to a student who had completed the course, is denied in in State ex rel. Burg v. Milwaukee Medical College (Wis.) 3 L.R.A.(N.S.) 1115, on the ground that there is an adequate remedy by an action for a breach of the contract, or by a suit for specific performance.

Master and servant. A novel and interesting question is decided in Farmer v. Kearney (La.) 3 L.R.A.(N.S.) 1105, holding that when workmen delegate to a labor organization the selection and control of fellow employees they absolve the employer from liability for injuries resulting from such improper selection or superintendence.

The right to set up the defense of common employment, in an action by the inmate of a workhouse, who was ordered by the labor master to assist in the work of carrying out an enlargement of the electric-light installation at the workhouse, and was put to work on a staging some distance above the ground, and was injured by the fall of the staging due to its negligent and improper construction, for which the engineer at the workhouse was responsible, is denied in Tozeland v. West Ham Union [1906] 1 K. B. 538, on the ground that the pauper was compelled to obey the order to assist in the work, and so could not be held to have taken upon himself the risk of injury from the negligence of the defendant's servants.

Mines. The California supreme court reverses, in Kern Oil Co. v. Crawford (Cal.) 3 L.R.A.(N.S.) 993, its former position by holding that the locator of a placer mining claim upon surveyed land of the United States, which is by statute required to follow the section lines, is not bound to mark the boundaries upon the ground.

Municipal corporations. That a mortgage upon a waterworks plant purchased by a town must be taken into consideration in determining whether or not it has exceeded its constitutional debt limit, is declared in Eddy Valve Co. v. Crown Point (Ind.) 3 L.R.A.(N.S.) 684, although there is no assumption of payment.

The liability of a municipal corporation, in the absence of negligence, to abutting owners for injuries caused by overflow in time of freshet, due to the stream being impeded by the construction of bridges to carry city streets across the stream, is denied in O'Donnell v. Syracuse (N. Y.) 3 L.R.A. (N.S.) 1053.

Negligence. The owner of a public bathing resort is held, in Larkin v. Saltair Beach Co. (Utah) 3 L.R.A.(N.S.) 982, to be negligent where he placed no sign as to depth of water, or marks to indicate danger, and kept no one at hand to aid persons in danger, and took no steps to aid a person actually in peril until too late to be of any avail.

Liability of a property owner or his servant for injury to a poacher guilty of a mis-

demeanor, by the negligent discharge of a firearm in the hands of the servant, is denied in Magar v. Hammond (N. Y.) 3 L.R.A.(N.S.) 1038.

One who leaves in a public highway a bomb capable of inflicting injury by being exploded, is held, in Wells v. Gallagher (Ala.) 3 L.R.A.(N.S.) 759, to be guilty of such a breach of duty that he cannot escape liability by the fact that the boy injured carries the bomb to an adjacent yard and there explodes it.

A fair association maintaining a track for horse races is held, in Higgins v. Franklin County Agric. Soc. (Me.) 3 L.R.A.(N.S.) 1132, to be bound to use reasonable care to keep the track free from danger to patrons at times when they are invited or permitted to cross.

Officers. The power of the legislature to extend the term of county officers by postponing the time for election is denied in State ex rel. Hensley v. Plasters (Neb.) 3 L.R.A.(N.S.) 887.

Oysters. See WATERS.

Perpetuities. See WILLS.

Physicians and surgeons. One who, as a matter of business, diagnoses disease by microscopic examination of the blood, and professes to cure it by the application of light, is held, in O'Neil v. State (Tenn.) 3 L.R.A.(N.S.) 762, to be within the provisions of a statute requiring a license for any person who shall profess to treat or prescribe for any physical ailment.

Pledge. The depreciation in value, after the maturity of a note, of corporate stock pledged as collateral security, is held, in Lake v. Little Rock Trust Co. (Ark.) 3 L.R.A.(N.S.) 1199, to be no defense to the maker of the note, as the pledgee is not bound to sell the stock if not paid at maturity.

Public improvements. Assessments of a fixed, definite sum per front foot, upon abutting property for the expense of a pipe laid in the public street for the distribution of water, are held, in Doughten v. Camden (N. J. Err. & App.) 3 L.R.A.(N.S.) 817, to be invalid.

Public lands. The owner of cattle, desiring to exercise the common right of pasturing them on public land, is held, in Anthony Wilkinson Live Stock Co. v. McIlquham (Wyo.) 3 L.R.A.(N.S.) 733, to suffer no such special injury by the wrongful fencing in of such land by a private citizen as entitles him to equitable relief.

Railroads. A speed of 50 miles an hour over an ordinary country-road crossing for which the statutory signals have been given is held, in Lake Shore & M. S. R. Co. v. Barnes (Ind.) 3 L.R.A.(N.S.) 778, not to be negligence *per se*.

A railroad company is held, in Yazoo & M. Valley R. Co. v. Sanders (Miss.) 3 L.R.A.(N.S.) 1119, to be liable for punitive damages to an adjoining landowner injured by the company's refusal to remove from its right of way the carcasses of animals killed by its trains, so that they become a nuisance.

The right of railway companies, not specially authorized to do so, to carry on business as omnibus proprietors for the purpose of distributing and collecting their passengers, is denied in Atty. Gen. v. Mersey R. Co. [1906] 1 Ch. 811.

Sale; warranty. The right of a seller to claim advance payments upon the theory of a forfeiture is denied in Pierce v. Staub (Conn.) 3 L.R.A.(N.S.) 785, where, after paying a portion of the purchase price under a contract containing no provision for forfeiture, the purchaser, who had never been in possession, defaulted, and was notified that his rights on the contract were terminated, and acquiesced therein.

The right to bring an action for the purchase price of goods before the expiration of the stipulated period of credit is denied in Tatum v. Ackerman (Cal.) 3 L.R.A.(N.S.) 908, notwithstanding the purchaser's refusal to accept the goods and his repudiation of the contract.

The right of the buyer to keep the contract in force and maintain separate actions for breaches as they occur, after refusal by the seller longer to comply with his contract to sell and deliver in instalments, is denied in Pakas v. Hollingshead (N. Y.) 3 L.R.A.(N.S.) 1042.

The right to return a stallion on account of breach of wararnty as to breeding qualities is held, in Rosenthal v. Rambo (Ind.) 3 L.R.A.(N.S.) 678, not to be defeated by increasing unsoundness resulting from the natural development of a disease incipient at the time of the sale.

Personal injuries caused by the breaking of a machine, and its failure to operate properly, are held, in Birdsinger v. McCor-

mick H. M. Co. (N. Y.) 3 L.R.A.(N.S.) 1047, not to be recoverable in an action for the breach of warranty.

Schools. See MANDAMUS.

Sealed verdict. A sealed verdict in a criminal case is held, in Koch v. Wisconsin (Wis.) 3 L.R.A.(N.S.) 1086, not subject to amendment to correct defects, after the jurors have been allowed to separate.

Specific performance. The specific performance of a contract by a manufacturer to furnish a cetain percentage of his freight tonnage to a railroad, which does not require the tonnage to be furnished as it accrues, is denied in Lone Star Salt Co. v. Texas S. L. R. Co. (Tex.) 3 L.R.A.(N.S.) 828, upon the ground that it would involve constant supervision by the court.

Statute of frauds. Taking possession sufficient to satisfy the statute of frauds is held, in Roberts v. Templeton (Or.) 3 L.R.A.(N.S.) 790, not to be shown where one in possession of a mining claim under a prospecting contract with one part owner purchased the share of the other owner, and merely continued his possession and operations without anything to connect him with the later contract.

Taxation. Special assessments for local improvements are held, in Arnold v. Knoxville (Tenn.) 3 L.R.A.(N.S.) 837, not to be taxes within meaning of the constitutional provision that taxation shall be equal and uniform.

Usury. See JUDGMENT.

Waters. The liability of the owner of a vessel sunken in a harbor without his privity or knowledge, for the expense of removing the wreck, is denied in Hagan v. Richmond (Va.) 3 L.R.A.(N.S.) 1120.

A private person, whose lawful business or occupation is interfered with, is held, in Viebahn v. Crow Wing County Comrs. (Minn.) 3 L.R.A.(N.S.) 1126, to have a right to proceed against a common nuisance in a public highway or navigable stream.

Tide lands are held, in Mobile Docks Co. v. Mobile (Ala.) 3 L.R.A.(N.S.) 822, not to pass by a grant of riparian rights.

One who for more than twenty years had used oyster ponds or "layings" which had existed as far back as living memory went, upon the foreshore of an arm of the sea, for the purpose of the storage of oysters and the fattening of them for market, was held, in Foster v. Warblington [1906] 1 K. B. 648, irrespective of the title to the soil or a several fishery, to be entitled, as occupier of the oyster ponds, to maintain an action for trespass on the ponds, against an urban district council, for injury to the ponds by the discharge of sewage therein.

Wills; perpetuities. Ante-testamentary declarations of a testator are held, in Hobson v. Moorman (Tenn.) 3 L.R.A.(N.S.) 749, to be inadmissible as substantive evidence of undue influence in the making of a will.

A recital, in a will, of a conveyance of land to a certain person is held, in Noble v. Tipton (Ill.) 3 L.R.A.(N.S.) 645, not to be effective as a devise, if the conveyance proves ineffectual.

A devisee of land encumbered after the execution of the will is held, in French v. French (Va.) 3 L.R.A.(N.S.) 898, to be entitled to have the encumbrance removed, at the expense of pecuniary and specific legacies, out of the personal estate, where the will directs payment of all debts from any personal property that the testator may have at the time of his death.

A condition forbidding an alienation for five years, annexed to a conveyance in fee simple, is held, in Latimer v. Waddell (N. C.) 3 L.R.A.(N.S.) 668, to be void.

A gift to take effect after the death of testator's children, and the youngest grandchild has been of age ten years, is held, in Re Kountz (Pa.) 3 L.R.A.(N.S.) 639, to be void under the rule against perpetuities.

A devise over upon the cessation of lineal descendants of the first taker is held, in Merrill v. American Baptist Missionary Union (N. H.) 3 L.R.A.(N.S.) 1143, to be void as against public policy.

New Books.

"Foibles of the Bench." By Henry S. Wilcox. (Legal Literature Co., Chicago, Ill.) $1.

The author has presented in a very readable little volume the foibles of Judges Knowall, Doall, Wasp, Fearful, Wabbler, Graft, Whiffet, Wind, and others with whom every practitioner is acquainted, and whose idiosyncrasies have been a matter of irritation, if not disgust, as well as an admirable picture of Judge Fair, and suggestions as to selection of judges and the relation between the Bench and the Bar.

"Tax Laws of Texas." By John T. Smith and B. F. Teague. (H. P. N. Gammel, Austin, Texas.) $3.

"Due Process of Law." By Lucius P. McGehee. (Edward Thompson Co., Northport, N. Y.) $3.

"The Law of Nuisance." By Joseph A. and Howard C. Joyce. (Matthew Bender & Co., Albany, N. Y.) $6.30.

"Telegraph and Telephone Companies." By S. Walter Jones. (Vernon Law Book Co., Kansas City, Mo.) $6.

"Session Laws for the 59th Congress, First Session." (Government Printing Office, Washington, D. C.) 2 vols. $4.

"Modern Business Corporations." By William A. Wood. With forms for the organization and management of corporations. By Louis B. Ewbank. (Bobbs-Merrill Co., Indianapolis, Ind.) $2.70.

"The Legal Counselor and Form Book." By Hon. Charles A. Hawkins. (Western W. Wilson, New York.) Buckram, $3. Sheep, $4.

"The Whole Law of New England Towns." By James S. Garland. (Boston Book Co., Boston.) $6.50.

Cumming and Gilbert's "New York Membership Corporations." (Banks & Co., Albany, N. Y.) $3.

Waugh's "New York Religious Corporations." (Banks & Co., Albany, N. Y.) $2.

Parker's "New York Village Law." (Banks & Co., Albany, N. Y.) $2.25.

Mason's "New York Highways." (Banks & Co., Albany, N. Y.) $2.50.

Dugan's "New York Justices' Manual." 5th Revision. (Matthew Bender & Co., Albany, N. Y.) 2 vols. $6.50.

Gilbert's "New York Supervisors' County & Town Officers' Manual." 3d ed. (Matthew Bender & Co., Albany, N. Y.) $6.30.

Bender's "New York Code Citations Analyzed." (Matthew Bender & Co., Albany, N. Y.) $1.

Recent Articles in Law Journals and Reviews.

"Hours of Labor—The State's Right to Limit the Hours of Labor is Denied."—63 Central Law Journal, 147.

"Fire Insurance—Limitations of Liability on Personal Property while Situated on Certain Premises."—33 National Corporation Reporter, 132.

"Independence of the Judiciary."—14 American Lawyer, 391.

"The Legitimate Functions of Judge-Made Law."—14 American Lawyer, 400.

"Some Recent Progress in International Law."—14 American Lawyer, 405.

"The Judiciary of the New State, as Suggested by the Judicial Systems in the States Lying East of the Mississippi River (Concluded)."—14 American Lawyer, 409.

"Powers of Revocation in Deeds."—63 Central Law Journal, 222.

"The Federal Jurisprudence in Relation to Irregular Municipal Bonds."—33 National Corporation Reporter, 97.

"Hours of Labor—Employment of Women and Children."—63 Central Law Journal, 181.

"Liability of an Agent under the Negotiable Instruments Law."—10 Law Notes, 104.

"The Copyright Bill, II."—10 Law Notes, 107.

"The Effect of Remarriage in Violation of the Act of 1905."—33 National Corporation Reporter, 37.

"The Duties and Responsibilities of Directors."—33 National Corporation Reporter, 46.

"Hours of Labor—Dangerous and Unhealthy Employments."—63 Central Law Journal, 163.

"The New Act, in Virginia, Concerning Demurrers to Evidence."—12 Virginia Law Register, 355.

"Liability of Master for Injury to Servant—Where Latter Belongs to Labor Union Which Controls the Selection of Servants."—68 Albany Law Journal, 177.

"Patent and Copyright Law, Considered with Reference to the Contract of Employment."—42 Canada Law Journal, 529.

The Humorous Side.

PLACES OF AMUSEMENT.—The walls of stations on the new tube from Waterloo to Baker street are embellished with maps of London, on which, according to the index in a corner of them, "theaters and places of amusement are printed in red." Among the places so indicated on the body of the maps

are Holloway Cattle Market, the Foundling Hospital, the Courts of Justice, the Bank of England and Spurgeon's Tabernacle.

—*The London Tribune.*

FROM FAR-AWAY MANILA.—It so happened that a steady line of decisions of the supreme court of the Philippine islands during the early months of the present year reversed numerous rulings by Judge ———, a trial judge lately resigned. So, when Colonel Joe Wolfson, formerly of the New Orleans Bar, arose one morning in July to argue a case for the appellant, he opened with these words: "If your Honors please, there are a few errors in this case in addition to the fact that the judgment below was rendered by Ex Judge S———."

And even the grave, stolid Filipino members of the court smiled.

ASKS TO "BE MADE INTO A LAWYER OF THE BAR."—

"Dear Gentlemen:—

"I just got your esteemes favor written by you yesterday and I hasten to take my pen in hand to tell you that I know that Mr. L——— is a inginer on a r r which goes from your town down to South and I hope you will take tickler pains to get this mans wages tached for as the lady he owes is a poar woman and it is for bord. and now gentlemen I like the style which you are doing this bizness in and would like it mighty well if you would please fix it in the court in your town so that I could be made into a lawyer of the bar next Monday as there is a excursion to go on our r r to the city on Sunday at 50cts. a round trip and I can get back in time if I leave your town by dinner time Monday. I am a justice here and I often find it would be pretty convenient in many cases before my court if I was a lawyer at the bar to if I have to I would stay over to Tuesday but it would be too much expense to stay very long. It is pretty hard to get in over here so that my bizness cant afford but I hear they are reasonable like in Kentucky and I wont have to waste any time to get into it. Please write to me in time fer Sundays train that you have got it fixed in the court all right and I will meet you in town on Monday and if you think I ought to pay anything down I will send you a check on our store for as much as $2-50 for charges if I have to. Hoping to hear from you real soon I remain,

"Truly your friend,

"H——— ———."

AN EPIC OF THE LAW.—Most of the readers of CASE AND COMMENT have heard of Eugene Ware, who lately resigned the office of Pension Commissioner, but perhaps few are aware that he once wrote a report of a case in verse, which was published in the Kansas Supreme Court Reports.

The case was State v. Lewis, published in 19 Kan. 260, 27 Am. Rep. 113. The defendant was charged with burglary, and, prior to his trial, broke jail and escaped. Upon being recaptured he was tried on the burglary charge and acquitted. He was then charged with the crime of breaking jail, and was convicted. This situation struck Mr. Ware as being humorous, and he wrote the following report, which was published in a footnote to the official report of the case:

In the Supreme Court, State of Kansas.
George Lewis, Appellant, v. The State of Kansas, Appellee.
(Appeal from Atchison county.)

Syllabus:

Law—Paw; Guilt—Wilt. When upon thy frame the law—places its majestic paw—though in innocence, or guilt—thou art then required to wilt.

Statement of Case, by Reporter:

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron-mail,
And resocked him into jail,—
Which said jail while so corraled,
He by sockage-tenure held.

Then the court met, and they tried
Lewis up and down each side,

On the good old-fashioned plan;
But the jury cleared the man.

Now, you think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw—
This time takes him round the cape
For effecting an escape;
He, unable to give bail,
Goes reluctantly to jail.

Lewis tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
"As my trial did attest,
"And while rightfully at large,
"Taken on a wrongful charge.
"I took back from them what they
"From me wrongly took away."
When this special plea was heard,
Thereupon the State demurred.

The defendant then was pained
When the court was heard to say
In a cold, impassive way—
"The demurrer is sustained."

Back to jail did Lewis go,
But, as liberty was dear,
He appeals, and now is here
To reverse the judge below.
The opinion will contain
All the statements that remain.

Argument, and Brief of Appellant:
As a matter, sir, of fact,
Who was injured by our act,
Any property, or man?—
Point it out, sir, if you can.

Can you seize us when at large
On a baseless, trumped-up charge;
And, if we escape, then say
It is crime to get away—
When we rightfully regained
What was wrongfully obtained?

Please-the-court-sir, what is crime?
What is right, and what is wrong?
Is our freedom but a song—
Or the subject of a rhyme?

Argument, and Brief of Attorney for the State:
When the State, that is to say,
We take liberty away—
When the padlock and the hasp
Leaves one helpless in our grasp,
It's unlawful then that he
Even dreams of liberty—
Wicked dreams that may in time
Grow and ripen into crime—
Crime of dark and damning shape;
Then, if he perchance escape,
Evermore remorse will roll
O'er his shattered, sin-sick soul.

Please-the-court-sir, how can we
Manage people who get free?

Reply of Appellant:
Please-the-court-sir, if it's sin,
Where does turpitude begin?

Opinion of the Court. Per Curiam:
We—don't—make—law. We are bound
To interpret it as found.

The defendant broke away;
When arrested, he should stay.

This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur.

(Note by the Reporter.)
Of the sheriff—rise and sing,
"Glory to our earthly king!"

E. F. W.

Which Law Governs?

A NOTE reserving 8 per cent interest is made in a state which allows only 6 per cent and is payable in a state which allows 10 per cent. Query: By the law of which state is the question as to usury to be determined?

A SALE of goods is made in a state where delivery is not necessary to protect the purchaser against the creditors of the seller but the goods at the time of the sale are in a state by the law of which delivery is necessary for such purpose.
Query: Which law governs?

A TESTATOR domiciled in one state devises real property in another to his "heirs at law." Query: By the laws of which state are the heirs to be ascertained?

The foregoing examples which might be almost indefinitely extended are illustrations of a class of questions that are arising with increasing frequency in the courts of this country.

These and all other concrete questions that have been passed upon by the courts involving conflict of laws are thoroughly discussed in **Wharton's Conflict of Laws, Third Edition (1905) by George H. Parmele.**

This work presents all the American and English decisions upon concrete questions involving conflict of laws, thus supplying concrete rules for concrete questions and obviating, so far as the development of the case law permits, the necessity of deducting rules from broad abstract principles or from rules applied to analogous questions.

It formulates, from the decisions in adjudicated cases, in connection with discussions in the opinions, the general principles governing the choice between conflicting laws of different states or countries.

It clears up so far as possible the confusion into which the subject has been thrown by the conflicting statements of general principles by the courts and text writers. In a great many instances it has been possible by careful study to harmonize apparently conflicting decisions and to reduce the case law on the subject to an orderly system.

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